BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHERYL A. HERSHBERGER	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,017,075
	)	
CITY OF WICHITA	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the October 18, 2005 Award by Special Administrative Law Judge (SALJ) Marvin Appling. The Board heard oral argument on January 20, 2005 in Wichita, Kansas.

APPEARANCES

Robert R. Lee, of Wichita, Kansas, appeared for the claimant. Edward D. Heath, of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that the 11 percent functional impairment awarded by the ALJ was not in dispute. The parties further agreed that in the event claimant is entitled to a work disability under K.S.A. 44-510e(a), the only evidence contained within the record on the issue of claimant's post-injury capacity to earn is $300 per week, which translates to a 37 percent wage loss.

ISSUES

The SALJ awarded claimant benefits based upon an 11 percent permanent partial whole body disability as a result of her compensable work injury. In addition to the

functional impairment, the SALJ concluded claimant sustained a 53 percent task loss along with a 27 percent wage loss.[1]

The claimant requests review of the nature and extent of her disability arguing that following her termination from respondent's employ, she made a good faith effort to find employment. And therefore her ultimate work disability must be based upon her actual wage loss rather than an imputed wage as utilized by the SALJ. Accordingly, claimant requests the Board modify the Award, finding she has a 100 percent wage loss and when averaged with her 53 percent task loss, which entitles her to a 76.5 percent work disability.

Respondent did not file a brief, but at oral argument suggested that claimant was not entitled to a work disability under K.S.A. 44-510e(a). Respondent contends claimant was terminated from her position at a time when she had no restrictions on her work activities. Thus, there is no connection between her termination and work-related injury, and although within a few weeks she received restrictions, she did nothing to preserve her job with respondent. Assuming claimant is, nonetheless, entitled to a work disability, respondent contends claimant has, at best, a 2-3 percent task loss attributable to her injury.

The sole issue to be addressed in this appeal is the nature and extent of claimant's impairment, including work disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a compensable injury on October 16, 2003 when she slipped and fell while performing her normal work duties. This accident left her with right hip and thigh complaints, right foot pain and low back complaints. She was referred to Dr. Mark Dobyns for treatment who first saw her on October 20, 2003.

Dr. Dobyns provided conservative treatment, including medications and physical therapy. He also placed her on light duty for a period of time. As her symptoms would improve, he would return her to work. Then, as the symptoms increased, he would again

[1] At oral argument the parties agreed that the SALJ's Award was either inconsistent or erroneous. While the SALJ assumed claimant made a good faith post-injury job search, he did not utilize her "actual" wage loss in computing the ultimate work disability as required under the law. Further, in imputing a wage to claimant the SALJ failed to recognize the inclusion of fringe benefits in determining the wage loss component of the work disability computation, again as required by statute. Thus, at a minimum, the Board must modify these aspects of the Award.

limit her work activities. Dr. Dobyns also referred claimant to Dr. Stein for a second opinion. Dr. Stein, who did not testify in this matter, apparently diagnosed meralgia paresthetica, a condition that involves the femoral cutaneous nerve, a nerve that provides no motor function. Rather, it is strictly a sensory nerve and when irritated, it can cause pain or numbness on the outer area of the thigh.[2]

Dr. Dobyns released claimant on August 2, 2004, indicating she had a complete resolution of her pain complaints. He assessed no work restrictions, or permanent impairment rating. When deposed, Dr. Dobyns testified that claimant had, at best, a 2 percent task loss as a result of her work-related injury based upon Jerry Hardin's vocational task analysis.[3]

At her lawyer's request, claimant was examined by Dr. George Fluter, a physiatrist, on August 19, 2004, just days after her last visit with Dr. Dobyns. Dr. Fluter concurred with the diagnosis of meralgia paresthetica. He further testified that claimant's fall aggravated her pre-existing degenerative disk disease in L3-4 and L4-5 as evidenced by the MRI performed at the request of Dr. Dobyns.

Following his examination, Dr. Fluter assigned a 13 percent permanent impairment to the body as a whole. This 13 percent is comprised of 5 percent to the low back, 4 percent for the sensory abnormalities attributable to the femoral cutaneous nerve problem, 2 percent for arthritic changes of the right sacroiliac joint and 2 percent for arthritic changes of the right first metatarsophalangeal joint.

Dr. Fluter also testified that claimant's future work activities should be limited by the following restrictions: claimant should limit her bending, stooping and twisting to only occasionally, avoid squatting and kneeling, crawling and climbing, lifting, carrying, pushing or pulling 20 pounds only occasionally and 10 pounds frequently. Claimant was instructed to also avoid prolonged walking and standing. And based upon Jerry Hardin's vocational task analysis, Dr. Futer indicated claimant sustained a 53 percent task loss based upon those restrictions.

According to claimant, she continues to suffer the effects of her injury. While her low back and foot no longer seem to give her much problem, the bulk of her complaints are in her right thigh. She testified her right hip is numb and when she puts pressure on her leg it hurts. Claimant also stated that when she steps she feels a turning and grinding from the knee up to her hip.

On August 3, 2004, just after she was released by Dr. Dobyns but before she was seen by Dr. Fluter, claimant's employment was terminated. According to the written

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[2] Fluter Depo. at 7.

[3] Dobyns Depo at 15-16.

document authored by respondent, this termination was due to her inability to perform the essential functions of her position as a result of her condition which is aggravated by the walking that was required.[4]

Since leaving her job with respondent, claimant sought work at a variety of places as shown by her written job search. Although her job search listing shows her efforts began in September 2004, a month after her termination, claimant testified that she believed she had looked for employment in August. Those efforts essentially stopped in early December 2004 because claimant enrolled in a vocational program to become a certified nurses aid (CNA). That program began in early January 2005, and shortly after the Regular Hearing claimant was scheduled to graduate and would be eligible for work.

According to Mr. Hardin, claimant's capacity to earn wages, independent of the additional training as a CNA, was approximately $300 per week, a sum that equates to a 37 percent wage loss when compared to her preinjury wages. He further testified that the beginning salary for a CNA was approximately $280 per week.

The SALJ concluded claimant sustained an 11 percent functional impairment, a finding which is not in dispute. Thus, that aspect of the Award is affirmed. It is the nature and extent of claimant's entitlement to permanent partial general disability, also known as work disability, that is the sole dispute in this claim.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.[5] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability

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[4] *Id.* at 23.

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

While the SALJ understood the need to examine claimant's efforts to find appropriate post-injury employment for purposes of determining claimant's work disability, his ultimate conclusions as to good faith and claimant's wage loss are inconsistent and contrary to the law. First, the SALJ assumed claimant made a good faith effort to find employment. He then imputed a wage to claimant, utilizing a 27 percent wage loss figure. Assuming claimant did make a good faith effort, then her wage loss component should have been 100 percent, rather than the 27 percent figure. Secondly, the 27 percent figure fails to take into account the fact that claimant's fringe benefits were discontinued as of the last date she worked for respondent. At that point, K.S.A. 44-511 requires the average weekly wage to be recalculated to include the value of the discontinued fringe benefits. Here, the parties agree that figure is $474.81 and yields a 37 percent wage loss.

Respondent does not explicitly argue that claimant has failed to put forth a good faith effort to find post-injury employment. Nonetheless, in light of *Foulk* and *Copeland*, the Board must consider whether claimant's effort was sufficient. Her job search record shows that between September 14 and December 8, 2004 she made 22 inquiries of businesses within Wichita. Her list is not extensive and at most, she looked for work 3 times in one day. She did not look for work every day, and in some instances she only made one contact in a day. To claimant's credit she signed up and intended to complete a vocational program to become a certified nurses aid. According to Mr. Hardin, that effort will not yield a comparable wage at the outset and even after a significant period of time, her anticipated wages will not meet or exceed those available to her in her former position with respondent or, for that matter, the $300 per week Mr. Hardin believes she can make in other endeavors. Moreover, the duties required of a CNA likely exceeds the restrictions imposed upon her by Dr. Fluter

The SALJ expressed some concern at claimant's post-injury job search but assumed claimant met her burden of establishing a good faith effort to find employment. The Board has considered this issue and disagrees with the SALJ. The Board finds that claimant's post-injury job search efforts were insufficient. Under these facts and circumstances, inquiring of 22 employers over a 3 month period does not constitute good faith. And once she decided to enroll in a vocational program, her efforts stopped altogether even though her schooling did not commence until January 2005. Although claimant's CNA training may have since yielded employment and her actual wages may

be lower than predicted by Mr. Hardin, the Board is persuaded by his testimony that claimant is capable of earning $7.50 per hour, working full-time. This yields a 37 percent wage loss.

As for the 53 percent task loss found by the ALJ, the Board finds that this conclusion is well founded in the evidence. Dr. Dobyn's conclusion that claimant bears a zero to 3 percent task loss is not persuasive given claimant's present physical complaints and her restrictions. Even Dr. Dobyns recognized that claimant's work activities for respondent caused a periodic increase in her complaints and required her to be off work. The 53 percent task loss is, therefore, affirmed.

Claimant's work disability under K.S.A. 44-510e(a) is therefore modified to 45 percent.

The Board rejects respondent's suggestion that claimant is not entitled to a work disability because there is no connection or "nexus" between her termination and her work injury. First, this is irrelevant. Second, there clearly was such a connection. On July 26, 2004, the claimant was notified, in writing, of a pre-termination meeting.[6] This letter indicates claimant is presently on restrictions due to her work-related injury, and that claimant had indicated her resulting "condition is permanent and is aggravated by the walking required to perform the essential functions" of her job.[7] That same letter indicates that the "Work Restrictions Committee" concluded that she is unable to perform her job functions and did not qualify for any open positions. Following a subsequent meeting, claimant was terminated as of August 4, 2004.

The contents of this letter reveal a very direct correlation between claimant's accidental injury and her subsequent termination. To suggest otherwise does not explain her termination. Accordingly, the Board rejects respondent's contention.

All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated October 18, 2005, is modified as follows:

The claimant is entitled to 20.35 weeks of temporary total disability compensation at the rate of $269.26 per week or $5,479.44 followed by 20.94 weeks of permanent partial

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[6] R.H. Trans., Ex. 3 (July 26, 2004 letter from Bailis Bell, Dir. of Airports).

[7] *Id.*

disability compensation at the rate of $269.26 per week or $5,638.30 followed by 163.4 weeks of permanent partial disability compensation at the rate of $316.56 per week or $51,725.90 for a 45 percent work disability, making a total award of $62,843.64.

As of January 31, 2006 there would be due and owing to the claimant 20.35 weeks of temporary total disability compensation at the rate of $269.26 per week in the sum of $5,479.44 plus 20.94 weeks of permanent partial disability compensation at the rate of $269.26 per week in the sum of $5,638.30 plus 78.42 weeks of permanent partial disability compensation at the rate of $316.56 per week in the sum of $24,824.64 for a total due and owing of $35,942.38, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $26,901.26 shall be paid at the rate of $316.56 per week for 84.98 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of January, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Edward D. Heath, Attorney for Self-Insured Respondent
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director